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85-5972

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS N. SCHIRO,

Petitioner,

- vs. -

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

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23pp

QUESTION PRESENTED

Whether imposition of the death penalty violates the constitutional requirement of reliability in capital sentencing under the Eighth Amendment of the Constitution of the United States, where a trial judge overrides a jury recommendation against the death penalty and relies upon personal observations of the defendant made by the judge outside of the courtroom proceedings?

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana filed on June 28, 1985.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Indiana, Cause No. 1084 S 423, is reported at 479 N.E.2d 556 (Ind. 1985) and is annexed as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Indiana was filed on June 28, 1985, and rehearing was denied on September 4, 1985. See Appendix B. Jurisdiction of this Court in invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. This action is brought

within the time limitations set forth in Supreme Court Rule 20.2, and 28 U.S.C. §2101(c), as the decision of the Supreme Court of Indiana affirming the denial of the petition for post-conviction relief in this case is a judgment in a civil action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States:

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The case also involves Indiana Code 35-50-2-9, which is annexed as Appendix C.

STATEMENT OF THE CASE

On September 12, 1981, following a trial by jury, Thomas Schiro was convicted of murder in Brown County, Indiana. Because the State had alleged the existance of an aggravating circumstance pursuant to the death penalty statute, Ind. Code 35-50-2-9, on September 15, 1981 the jury reconvened for the penalty phase of trial and returned a unanimous verdict recommending that the death penalty not be imposed upon Schiro. Thereafter, the trial judge conducted a sentencing hearing on October 2, 1981. The judge did not follow the jury's recommendation, and included the following statement in his written order imposing the death penalty:

> This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

Before issuing a written opinion on the direct appeal of the conviction and sentence, the Supreme Court of Indiana ordered the trial judge to make a nunc pro tunc entry to set forth new reasons for imposing the death penalty because "[t]he original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty." Schiro v. State, 451 N.E.2d 1047, 1056 (Ind. 1983), cert. denied, __ U.S.___, 103 S.Ct. 510, 78 L.Ed.2d 699. On February 22, 1983, the trial court certified to the Supreme Court of Indiana a new "Pronouncement of Sentence," which included verbatim the passage quoted above from the original sentencing order. On August 5, 1983, the Supreme Court of Indiana affirmed the conviction and death sentence, and on November 28, 1983 the Supreme Court of the United States denied a petition for writ of certiorari. Id.

On May 10, 1984, Schiro filed an amended petition for post-conviction relief alleging that the death sentence violated the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States because the trial judge improperly considered Schiro's conduct based upon the judge's view of Schiro outside of the court in the judge's outer chambers, and because of evidence that the judge was biased in favor of imposing the death penalty regardless of the jury's recommendation [TR.96]. An evidentiary hearing was held on the post-conviction relief petition, and testimony was offered concerning a statement made by the trial judge just prior to the verdict in the guilt phase of trial which presupposed that the death penalty would be imposed if Schiro were found guilty of murder. Following the denial of the petition for post-conviction relief in the trial court before a new judge, Schiro raised his same constitutional claims on appeal in the context of "whether the post-conviction court erred in finding the death penalty was proper in light of [the] allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination." Schiro v. State, 479 N.E.2d 556, 558 (Ind.

1985). In affirming the judgment denying post-conviction relief, the Supreme Court of Indiana addressed Schiro's claims on the merits and concluded that "[t]he post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge." Id., 479 N.E.2d, at 561.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, AFTER SPAZIANO V. FLORIDA, A STATE MAY ALLOW ITS JUDGES UNGUIDED DISCRETION TO OVERRIDE A UNANIMOUS JURY RECOMMENDATION AGAINST IMPOSITION OF THE DEATH PENALTY WITHOUT OFFENDING THE CONSTITUTIONAL REQUIREMENT OF RELIABILITY IN CAPITAL SENTENCING PROCEDURES.

This Court has long recognized that "[b]ecause of the qualitative difference [of the death penalty], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280,305,96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Thus, "many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231. In Spaziano v. Florida, 468 U.S. ___, 103 S.Ct. 3154, 82 L.Ed.2d 340 (1984), this Court wrote that "[w]e reaffirm our commitment to the demands of reliability in decisions involving death," at ___,104 S.Ct., at 3160, while also establishing that "there is no constitutional requirement that the jury's recommendation of life be final." Id., at ___, 104 S.Ct., at 3157. The question raised by the present case is whether, in accordance with the Eighth Amendment requirement of reliability in capital sentencing, a state may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty.

In the present case the judge overturned a unanimous jury recommendation against the death penalty and cited his impressions that the jury had been misled by Schiro's rocking motions in court which stopped when the jury was absent from the courtroom. But the observations which lead the judge to conclude that the jurors had been misled in their recommendations were based upon the judge's view of Schiro outside of the court in the judge's outer chambers. The observations were made over an eight day period of time when counsel may or may not have been present and with no formal procedural safeguards to assure reliability and validity in the observations. In particular, because the fact that the observations made by the judge became known only after the completion of sentencing proceedings when the judgment of sentencing was pronounced, there was no meaningful opportunity to challenge the observations cited by the judge as evidence that the jury may have been misled by Schiro's rocking motion which had accompanied lengthy and contested evidence regarding the question of his sanity. Unlike information contained in a presentence report which a defendant has an opportunity to explain or deny, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, or unlike demeanor evidence gathered "in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," Turner v. Louisiana, 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13, L.Ed.2d 424, the observations cited by the trial judge permitted him to exercise free-wheeling discretion in overriding the unanimous recommendation of the jury.

This Court's decision in Spaziano v. Florida does not settle the important issue of whether a state may give its judges unguided discretion to override a jury recommendation against the death penalty. In that decision, the Court found that the Florida standards for overriding a jury's recommendation were not "so board and vague as to violate the constitutional

requirement of reliability in capital sentencing." Id., at ___, 104 S.Ct., at 3157. In particular, the Court cited the "significant safeguard" established by the standards in Tedder v. State, 322 SO.2d 908 (1975), which the Court had recognized in the past as an important component of the Florida capital sentencing procedures. See Proffitt v. Florida, 428 U.S. 242, 249-250, 96 S.Ct. 2960, 2965-2966, 49 L.Ed.2d 913 (1976); Dobbert v. Florida, 432 U.S. 282, 295, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 344 (1977); Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3427, 77 L.Ed.2d 1134 (1983). Under the Florida standard, the override of a jury recommendation against the death penalty is permitted only where the evidence favoring death is "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra, 322 So.2d, at 910. In Spaziano v. Florida, the Court rejected the claim that the judge's override in that case violated the constitutional requirement of reliability because "[w]e are satisfied that the Florida Supreme Court takes [the Tedder] standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." Id., at ___, 104 S.Ct., at 3166.

The decision of the Supreme Court of Indiana in the present case makes it clear that in Indiana trial judges are accorded unguided discretion to override a jury recommendation against imposition of the death penalty. Insofar as the Supreme Court of Indiana has articulated any rules for the meaningful appellate review of death sentences, the court has adopted a rule applicable to any type of sentence whereby the court will only disturb sentences that are "manifestly unreasonable," which means that "no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed." Judy v. State, 416 N.E.2d 95, 107 (Ind. 1981); Brewer v. State, 417 N.E.2d 889, 899 (Ind. 1981); Williams v. State, 430 N.E.2d 759, 765 (Ind. 1982). The "manifestly unreasonable" standard does not yield under the circumstance where a judge overrides a jury recommendation

against the death penalty. See Schiro v. State, 451 N.E.2d 1047, 1052 (Ind. 1983). The "manifestly unreasonable" standard sets up a presumption in favor a judge's decision to override a jury recommendation, which is in sharp contrast to the "significant safeguard" established by the Tedder standard that gives careful scrutiny to the override decision. The decision in the present case demonstrates that the discretion accorded a trial judge in overriding a jury recommendation in Indiana runs so far afield as to permit reliance upon out of court personal observations of a defendant by the judge which counsel have no opportunity to explain or contest. This unguided discretion is contrary to the procedures required in Florida under the Tedder standard. To the extent that the existence of the Tedder standard was essential to satisfy the Court that there was no violation of the constitutional requirement of reliability in the Spaziano case, those principles cannot be reconciled with the manner in which the trial judge arrived at his decision to reject the jury's recommendation against the death penalty in Schiro's case. This Court, therefore, should grant certiorari to determine whether, after Spaziano v. Florida, a state may allow its judges unguided discretion to override a unanimous jury recommendation against imposition of the death penalty without offending the constitutional requirement of reliability in capital sentencing procedures.

CONCLUSION

Based upon the foregoing reasons, Petitioner Thomas N. Schiro requests this Court to grant certiorari to review the Supreme Court of Indiana decision on the important federal constitutional question presented here.

Respectfully submitted,

By: Paul Levy
Paul Levy
Deputy Public Defender
Attorney for Record

counsel was inadequate because he did not submit such an instruction.

In deciding whether to give a lesser included offense instruction, the trial court applies the following test:

"In determining whether to instruct the jury that they may return verdicts on lesser-included offenses, the trial court must apply a two-part test. First, by examining the statutes defining greater and lesser-included offenses, and the charging instrument, the court determines whether the lesser-included offenses to be instructed are inherently included in the greater charge, or 'factually' included in the charging instrument's allegations of the means by which the greater crime allegedly was committed. Second, the court must make a determination of whether, assuming that an offense was committed, the evidence would, *prima facie*, warrant a conviction for a lesser-included offense, or could only warrant a conviction for the principal charge, in which case the lesser-included offense instructions should not be given." (citations omitted.)

Henning v. State (1985), Ind., 477 N.E.2d 547, 550-551. In this case the evidence conclusively demonstrated that Officer Bauner obtained phencyclidine from someone. The issue at trial was whether or not he obtained phencyclidine from the Defendant. Thus, there is no question that a transaction involving phencyclidine did occur. An instruction that the jury could convict Defendant of the lesser offense of "possession," thus, would not have been warranted under the evidence, would have invited a compromise verdict, and would properly have been refused. Defendant has demonstrated no error by counsel in failing to submit such instructions.

[9, 10] Finally, Defendant presents a general attack upon trial counsel's performance, arguing in particular that he should have called character witnesses or presented other evidence on Defendant's behalf. However, before a claim of ineffective assistance of counsel can be premised upon his failure to present evidence, it must be shown that such evidence existed and was reasonably available. Defendant's claim of ineffective assistance of counsel is not borne out by the inaction cited.

We find no error, hence the judgment of the trial court is affirmed.

GIVAN, C.J., and DeBRULER and PIVARNIK, JJ., concur.

HUNTER, J., not participating.

Thomas N. SCHIRO, Appellant,
v.
STATE of Indiana, Appellee.
No. 1084S423.
Supreme Court of Indiana.
June 28, 1985.
Rehearing Denied Sept. 4, 1985.

Defendant, petitioned for postconviction relief. The Circuit Court, Brown County, James M. Dixon, J., denied the petition. Defendant appealed. The Supreme Court, Givan, C.J., held that: (1) trial judge's finding that defendant might have misled jury by his continual rocking motions during trial did not constitute basis for imposition of death penalty; (2) defendant had opportunity to challenge trial judge's observations regarding his conduct so that defendant's due process rights were not violated; (3) the trial judge's observations regarding defendant's conduct were not directed toward defendant's exercising of his constitutional rights; (4) defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain; (5) judge's remark regarding whether defendant was going to live or die was

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insufficient evidence from which to conclude that judge was so biased as to make sentencing determination arbitrary or capricious; and (6) instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms.

Affirmed.

DeBruler, J., dissented and filed an opinion.

1. **Criminal Law ⇐1158(1)**

In reviewing denial of posteonviction petition, Supreme Court does not weigh evidence or judge credibility of witnesses.

2. **Criminal Law ⇐1158(1)**

On review of denial of postconviction petition, petitioner must satisfy Supreme Court that evidence as whole leads unmistakably to decision in his favor.

3. **Criminal Law ⇐1208.1(4)**

Although trial judge's observations of defendant's behavior during course of trial were germane to his consideration of jury's recommendation that death penalty not be imposed, trial judge's finding that defendant might have misled jury by his continual rocking motions during trial when jury was present, but which did not occur when defendant was out of jury's presence, did not constitute basis for imposition of death penalty.

4. **Criminal Law ⇐1208.1(4)**

Trial court, within its discretion, can consider defendant's behavior in courtroom, regardless of whether jury is present and thus, judge in capital case is not precluded from considering defendant's behavior during course of trial even if evidence of such behavior is not admitted into evidence.

5. **Criminal Law ⇐986.2(6), 986.4(1)**

Trial court can properly consider such "non-evidentiary" information as presentence investigation report and its perception of defendant's remorse or lack thereof.

6. **Constitutional Law ⇐270(2)**

Defendant's due process rights were not violated under theory that death sentence was imposed on basis of information which defendant had no opportunity to deny or explain where, at sentencing hearing, judge expressly stated his observations of defendant's behavior and its relevance to sentencing determination, and thus defendant had opportunity to challenge observations and judge's conclusions based thereon, and where testimony was introduced to trial by both sides in reference to defendant's prior rocking behavior so that defense counsel could have presented additional evidence at sentencing hearing pertaining to statutory mitigating circumstances. IC 35-50-2-9(d)(1982 Ed.); U.S.C.A. Const. Amends. 5, 14.

7. **Criminal Law ⇐393(1)**

Trial judge's observations about defendant's rocking motions during trial were directed toward possible mitigating factors and jury's recommendation that death penalty not be imposed, not to defendant's exercising of his constitutional rights, and thus, trial court's consideration of defendant's behavior did not violate his right against self-incrimination. IC 35-50-2-9(d) (1982 Ed.); Const. Art. 1, § 14; U.S.C.A. Const.Amend. 5.

8. **Criminal Law ⇐641.13(7)**

Defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain where, at sentencing hearing, trial judge specifically stated his observations of defendant's behavior and jury's presence and relevance of those observations to sentencing determination so that counsel had opportunity to contemporaneously object to or rebut judge's observations. U.S.C.A. Const.Amend. 6.

9. **Criminal Law ⇐655(1)**

Judge's remark regarding whether defendant was going to live or die, made in emotionally charged atmosphere preceding return of verdict, was insufficient evidence from which to conclude that judge was so biased as to make sentencing determination arbitrary or capricious.

10. **Criminal Law ⇐1144.10**

In addressing issue of competency of counsel, Supreme Court indulges strong presumption that counsel's conduct falls within wide range of reasonable professional assistance.

11. **Criminal Law ⇐641.13(1)**

Under "performance component" of test employed in addressing issue of competency of counsel, defendant must show that counsel's alleged acts or omissions fell outside of wide range of reasonable professional assistance; if defendant satisfies that step, he must then establish under "prejudice component" that counsel's errors had adverse effect upon judgment.

12. **Criminal Law ⇐641.13(1)**

In applying two-step test employed in addressing issue of competency of counsel, it is not necessary to address both components if defendant makes insufficient showing as to one.

13. **Criminal Law ⇐641.13(2)**

Instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms for "guilty of murder while committing and attempting to commit rape but mentally ill" and "guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill," and thus, defendant was unable to establish that his trial counsel's failure to assure that jury received all necessary verdict forms had adverse effect on judgment. U.S.C.A. Const.Amend. 6.

Susan K. Carpenter, Public Defender, Frances Watson Hardy, Deputy Public Defender, Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Chief Justice.

Appellant was convicted by a jury of Murder While Committing or Attempting to Commit Rape. The trial court sentenced appellant to death. The conviction and death sentence were affirmed by this Court on direct appeal. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047 (DeBruler, J., and Prentice, J., dissenting as to sentence), *cert. denied*, — U.S. —, 104 S.Ct. 510, 78 L.Ed.2d 699. Appellant's Petition for Post-Conviction Relief was denied. He now appeals.

The facts of this case were set out at length in the opinion on direct appeal. *Schiro, supra* at 1049-50. They will not be repeated here.

Appellant raises two issues in this appeal: whether the post-conviction court erred in finding the death penalty was proper in light of his allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination; and whether the post-conviction court erred in finding appellant was not denied effective assistance of counsel.

[1, 2] In reviewing the denial of a post-conviction petition, this Court does not weigh evidence nor judge the credibility of witnesses. *Owens v. State* (1984), Ind., 464 N.E.2d 1277. The petitioner must satisfy this Court that the evidence as a whole leads unmistakably to a decision in his favor. *Bean v. State* (1984), Ind., 467 N.E.2d 671.

Appellant's first issue is divided into four subissues. In the first three subissues, which address the trial court's consideration of his behavior during the trial, appellant alleges: 1) that the information could not be relied upon because it was not introduced into evidence; 2) that because he did not testify, reliance on observations of his behavior violated his Fifth Amendment rights; and 3) that he was denied his right to effective assistance of counsel because defense counsel was not afforded an opportunity to comment on facts influencing the sentencing decision. The fourth subissue

concerns a comment made by the trial judge which appellant argues demonstrates the judge was biased and therefore unable to objectively render the sentencing determination.

Upon review of appellant's direct appeal, this Court found the trial court's original findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro, supra* at 1056. We ordered the court to make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind. Code § 35-50-2-9. *Id.* In its *nunc pro tunc* entry the court found that the aggravating circumstance set out in Ind.Code § 35-50-2-9(b)(1) was proved beyond a reasonable doubt.

The court then stated that it found no mitigating circumstances, and addressed each of the possible mitigating circumstances delineated in Ind.Code § 35-50-2-9. In reference to the statutory mitigating circumstances concerning a defendant's mental or emotional condition, subsection (c)(2), and impairment of a defendant's capacity to appreciate the criminality of his conduct, subsection (c)(6), the court made the following finding:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

Appellant contends this finding constitutes the court's primary basis for sentencing him to death after the jury had recommended the death penalty not be imposed. He argues that "obviously" the court based its death penalty judgment on its observations, representing an "absolute denial of due process."

[3] We cannot agree with appellant's conclusory assertion that the court based its judgment on observations of his behavior. The court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt. *Schiro, supra* at 1058. It addressed each of the possible mitigating circumstances delineated in the statute. Regarding appellant's mental state, the court made additional findings which cited testimony by psychiatric experts and evidence of appellant's attempt to conceal his crime. *Id.* at 1059. While the court's observations were certainly germane to its consideration of the jury's recommendation, it cannot be said its finding that appellant may have misled the jury constituted the basis for imposition of the death penalty.

[4, 5] Neither can we agree with appellant's contention that consideration of his behavior was impermissible because it was information not admitted into evidence. It is axiomatic that a trial court, within its discretion, can consider a defendant's behavior in the courtroom, regardless of whether the jury is present. The court can properly consider such "non-evidentiary" information as the pre-sentence investigation report and its perception of a defendant's remorse or lack thereof. We find no authority to support the conclusion appellant would have us draw, that a judge in a capital case is precluded from considering a defendant's behavior during the course of the trial if evidence of such behavior is not admitted into evidence.

Appellant nevertheless argues that under *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, the death penalty is invalid. In that case a Florida jury recommended a life sentence. The trial judge, as in the instant case, overrode the jury's recommendation and sentenced the defendant to death. In imposing the death penalty the judge stated that his decision was based in part on a presentence report which contained a confidential portion not available to the defense.

Id. at 353, 97 S.Ct. at 1202, 51 L.Ed.2d at 398-99.

The United States Supreme Court vacated the death sentence. The Court concluded the petitioner was denied due process because the death sentence was imposed, at least in part, on the basis of information which the petitioner had no opportunity to deny or explain. *Id.* at 362, 97 S.Ct. at 1207, 51 L.Ed.2d at 404. The Court found that because the confidential portion of the report was not part of the record on appeal, the Florida Supreme Court was unable to consider "the total record" in its review. *Id.* at 361, 97 S.Ct. at 1206, 51 L.Ed.2d at 404.

[6] The instant case is distinguishable. At the sentencing hearing the judge expressly stated his observations of appellant's behavior and its relevance to the sentencing determination. Appellant thus had an opportunity to challenge the observations, and the judge's conclusion based thereon, either contemporaneously or upon filing his motion to correct error. Further, this Court explicitly considered the controverted finding on review of appellant's direct appeal. *Schiro, supra* at 1057, 1059.

We also note that testimony was introduced at trial by both sides in reference to appellant's prior rocking behavior. Appellant introduced testimony that he rocked in the presence of witnesses. Despite appellant's contention of lack of notice of the court's conclusion based on such behavior, defense counsel, who was certainly aware of the continual rocking motions referred to by the court, could have presented additional evidence at the sentencing hearing pertaining to the statutory mitigating circumstances. *See* Ind.Code § 35-50-2-9(d). The due process violation found in *Gardner, supra* is not present here.

Appellant contends that because under the Fifth Amendment of the United States Constitution and Art. 1, § 14 of the Indiana Constitution the general trial demeanor and manner of a defendant who does not take the stand cannot be considered against him and no inference can be drawn from his failure to testify, the trial court's consideration of his behavior violates his right against self-incrimination.

[7] This argument is without merit. The sole case cited by appellant, *People v. Ramirez* (1983), 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31, is inapposite to the circumstances of the instant case. In *Ramirez* the State's attorney commented to the sentencing jury that the defendant had "sat silent" and offered no explanation for the crime. The Supreme Court of Illinois' decision to vacate the death sentence was based on the prosecutor's comment and the trial judge's refusal to properly instruct the jury not to consider the defendant's decision not to testify at the sentencing hearing. *Id.* at 472-73, 457 N.E.2d at 47.

Although the impermissible comment in *Ramirez* was couched in terms of the defendant's "conduct", the crux of the constitutional violation was the impropriety of commenting on the defendant's decision not to testify. Here, the trial judge's observations were directed to two of the possible mitigating factors and to the jury's recommendation, not to appellant's exercising of his constitutional rights. The record does not reveal any comment by the prosecution or by the court made in reference to appellant's decision not to testify at the sentencing hearing.

In an argument related to his contention that the trial court erred in considering non-evidentiary information, appellant asserts he was denied his Sixth Amendment right to effective representation upon the sentence being based on information which he had no opportunity to deny or explain.

[8] This argument is also without merit. At the sentencing hearing the trial judge specifically stated his observations and their relevance to the sentencing determination. Counsel thus had the opportunity to contemporaneously object to or rebut the judge's observations. As the finding was stated explicitly and openly, we cannot conclude that the court's reference to its observations of appellant's demeanor precluded defense counsel from commenting on facts influencing the sentencing deci-

sion. *See Gardner, supra*, 430 U.S. at 360, 97 S.Ct. at 1206, 51 L.Ed.2d at 403.

In his fourth subissue appellant alleges the trial judge was biased. This allegation is premised on a comment made by the judge to a newspaper reporter which appellant argues supports the conclusion the judge had predetermined that the death penalty would be imposed.

The newspaper reporter, Jocelyn Winnecke of the *Evansville Sunday Courier and Press*, testified at the post-conviction hearing that the judge, The Honorable Samuel R. Rosen, remarked to her after the guilty verdict was returned that "we're going to fry the boy." Judge Rosen testified that before entering the courtroom to receive the guilty verdict he said "soon we'll know whether he'll live or die." Judge Rosen also testified that he would never use the word "fry" in that context and that he did not make up his mind until the date of sentencing whether the death penalty would be imposed. Vanderburgh County Deputy Prosecutor Jerry Atkinson, who prosecuted the case, was privy to the conversation between Winnecke and Judge Rosen. His recollection at the hearing was that Judge Rosen stated "I think the boy is going to die."

[9] Appellant argues that the judge's statement, coupled with the judge's reliance on his personal observations, conclusively reflects bias and a predetermination of the death sentence. As stated *infra*, the observations were properly relied upon by the judge and in no way represent a loss of objectivity. The comment made by Judge Rosen, in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious. The post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge.

Appellant also alleges he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to assure that the jury received all the necessary verdict forms.

[10, 11] In addressing the issue of competency of counsel, this Court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Bailey v. State* (1985), Ind., 472 N.E.2d 1260; *Elliott v. State* (1984), Ind., 465 N.E.2d 707. We apply a two-step test comprised of a "performance component" and a "prejudice component". Under the first step, a defendant must show counsel's alleged acts or omissions fell outside the wide range of reasonable professional assistance. If the defendant satisfies the first step of the test, he must then establish that counsel's errors had an adverse effect upon the judgment. *Richardson v. State* (1985), Ind., 476 N.E.2d 497; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

Trial counsel did not submit verdict forms for the offenses of guilty of murder while committing and attempting to commit rape but mentally ill and guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill. *Schiro, supra* at 1062. Appellant contends that because the jury returned a felony murder guilty verdict on a count for which they were not supplied with a guilty but mentally ill verdict form confidence in the outcome of his trial was undermined.

This issue was raised in appellant's direct appeal in the context of trial court error in failing to supply the jury with all the necessary verdict forms. *Id.* We determined that appellant's Instruction No. 2, which informed the jury that the possible verdict of guilty but mentally ill was submitted to them on all counts of the information, sufficiently informed the jury that the mentally ill verdict "applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder." *Id.* at 1063. As appellant failed to show any prejudice, there was no reversible error on that issue. *Id.*

[12, 13] In applying the aforementioned two-step test, it is not necessary to address both components if the defendant makes an insufficient showing as to one. *Richardson, supra* at 501 (citation omitted). Because the instruction regarding the encompassing applicability of the guilty but mentally ill verdicts cured the potentially prejudicial impact of the omission of the verdict forms, appellant is unable to establish that counsel's omission had an adverse effect upon the judgment. The post-conviction court did not err in finding that appellant was not denied effective assistance of counsel.

The trial court is in all things affirmed.

PRENTICE and PIVARNIK, JJ., concur.

DeBRULER, J., dissents with separate opinion.

HUNTER, J., not participating.

DeBRULER, Justice, dissenting.

Petitioner-appellant was convicted of murder and sentenced to death. When the trial judge imposed the death sentence on October 2, 1981, he stated that he was relying in part on his personal observations of appellant's conduct in the Court's outer chambers, during the trial on the question of guilt or innocence, when the jury was not present. The trial judge had not previously disclosed to counsel for the parties that he had made those observations and that he would rely upon them in making the life or death decision. Thus, the decision itself was arrived at before counsel knew of this unique basis and had all opportunity to respond to it. This procedure does not satisfy the constitutional requirement of the due process of law.

In the aforementioned statement the judge said:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

This is the justification of the judge's rejection of the jury's recommendation of life. By this revelation, the judge discloses that he deemed himself by reason of his observations, to be in a better position than the jury to make the life-death decision. I believe this was error.

In *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 the sentencing judge indicated that he selected death in part because of information contained in a presentence report, which information had not been disclosed to the defendant or his counsel and to which the defendant had no opportunity to respond. The U.S. Supreme Court set the sentence aside. Here, the opportunity to respond to Judge Rosen's statement did not arise until after he had made and formally announced his decision to override the jury recommendation of life and impose death.

The standards of due process are flexible and dictated by the circumstances and competing interests involved. A hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. The interests of the defendant and the state in an accurate ascertainment of facts upon which a sentence of death may be given, are at the highest level. We are bound to adopt and adhere to procedures which insure against the arbitrary deprivation of life.

In these circumstances, the opportunity to respond to the factual information supplied by the judge's private observations, came after that factual information was used and the life or death decision was reached. This opportunity was not meaningful in time. The opportunity to respond

was restricted to a request to reconsider a decision which had already been reached and publicly announced. Much judicial time and energy had already been invested in arriving at that decision. One need only compare the process of reaching a decision with the process of retreating from a decision, to appreciate the reality of the restriction resulting from the procedure employed here. In sum, to permit the personal observations of the judge, this new matter, to be swept in at the last moment, without prior notice, and to be used as a critical part of the basis for the sentencing court's decision, is contrary to my sense of fairness.

Jerry Lee STOUT, Appellant
(Defendant Below),

v.

STATE of Indiana, Appellee
(Plaintiff Below).

No. 783 S 239.

Supreme Court of Indiana.

July 1, 1985.

Defendant was convicted in the Circuit Court, Jennings County, Larry J. Greathouse, J., of burglary and theft, and he appealed. The Supreme Court, Prentice, J., held that: (1) error in giving instruction on flight as evidence of guilt was harmless; (2) photographs of recovered stolen items were admissible; (3) testimony of accomplice as to defendant's participation in prior crimes was admissible; (4) police officer could testify regarding statements of third parties which caused him to take certain action; (5) theft of items from victim's home and of automobile from victim's garage constituted only single theft offense; and (6) consecutive sentences were warranted.

Affirmed in part, vacated in part, and remanded.

Pivarnik, J., concurred in part and dissented in part.

1. Criminal Law ⇐913(3), 1172.6

Trial court should not have given jury instruction on flight as evidence of guilt, in light of uncontradicted evidence showing that defendant surrendered to police and did not attempt to flee; error was harmless, however, in light of direct testimony of accomplice and ample physical evidence linking defendant to crime.

2. Searches and Seizures ⇐7(26)

Whether nonowner may challenge constitutional validity of search depends on whether he has legitimate expectation of privacy in place searched, which is fact question to be determined on case-by-case basis. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(26)

Frequent guest at premises he does not own has no legitimate expectation of privacy in premises, so as to give him standing to challenge constitutionality of search, unless he produces other evidence to show that he maintains degree of control over premises. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐7(26)

Evidence that defendant stayed at residence of his girlfriend "once in a while" was insufficient to establish his legitimate expectation of privacy in residence sufficient to give him standing to challenge constitutionality of its search; defendant made no showing that he had any degree of control over residence or any part therein. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐111

Victim's identification of photographs as pictures of items similar to those taken from his home was sufficient to establish relevancy and materiality of photographs in burglary prosecution, fact that victim

STATE OF INDIANA

CLERK OF THE SUPREME COURT
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TELEPHONE 317 1930

No. 1084S423

Thomas N. ~~XXXX~~ Schiro V. State of Indiana

You are hereby notified that the Supreme Court has on this day Appellants petition for Rehearing is hereby DENIED, without Opinion. Givan, C.J.
Givan, C.J., Prentice and Pivarnik, JJ., vote to deny. DeBruler, J., votes to grant. Hunter, J., not participating.

SEP 5 1985

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 4 day of Sept, 19 85

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

APPENDIX C - STATUTORY PROVISIONS INVOLVED

35-50-2-9. Death sentences. -- (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in the subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty [20] or more years remaining to be served before his earliest possible release date as defined by IC 35-38.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review.

[IC 35-50-2-9, as added by Acts 1977, P.L. 340, §122; P.L. 336-1983, §1.]